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ABSTRACT

This paper—part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002—is an outline of a presentation on collective bargaining in higher education. The first section covers representation issues, historical issues, and current trends, and includes subsections on faculty; training and research assistants; house staff, residents, and interns; the American Association of University Professors (AAUP) statement on collective bargaining; and AAUP policy for collective-bargaining chapters. The second section covers systematic preparation for collective bargaining, which includes a review of previous negotiations; a review of experience during term of current contract; internal and external data collection; development of a negotiation strategy; preparations regarding union proposals; communications; and bargaining representatives and arrangements. The third section lists key issues in collective bargaining. The fourth section looks at health insurance as a negotiation strategy. The fifth section outlines issues affecting part-time and adjunct faculty. The final section, the conclusion, states that: (1) organizational activity is on the upswing; (2) collective bargaining is here to stay; and (3) new issues require new approaches and thinking. (WFA)

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Trends in Higher Education Collective Bargaining.

Jon E. Anderson

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EDUCATION LAW ASSOCIATION
48TH ANNUAL CONFERENCE
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TRENDS IN HIGHER EDUCATION COLLECTIVE BARGAINING

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I. **Representation Issues – Historical issues/current trends.**

A. Faculty

1. NLRB v. Yeshiva University, 444 U.S. 672 (1980). (Faculty at private institutions are managers not protected by NLRA). (Affirms the determination of Second Circuit in 582 F.2d 686 (1978)).

2. University of Great Falls v. NLRB, 278 F.2d 1335 (D.C. Cir. 2002)

   a. Board ruled that employee or managerial status depended primarily on their authority over academic policy matters such as curriculum, grading systems, course scheduling, and admission standards. The UGF faculty made recommendations in many policy areas, but they would be managers only if "nearly all recommendations are routinely approved by the administrative hierarchy, without review." 325 NLRB No. 3 (1997)

   b. The university appealed the decision to court., The D.C. Circuit reversed the Board. The Court never considered the question of whether the professors were managers. The court concluded that the university was a religious institution and that the NLRB therefore lacked jurisdiction over it.

3. Manhattan College and Manhattan College Faculty Coalition, Case 2-RC-21735 (Nov. 1999). (Faculty have protected right to organize).

   a. [W]hile it is clear that the faculty has an obvious and pervasive influence on curricular and academic life at the College, their lack of majority representation on committees empowered to create academic policy militates against finding them managerial employees.

4. NLRB v. Catholic Bishop of Chicago, 440 US 490 (1990) (lay teachers in schools operated by a church to teach both religious and secular subjects not within jurisdiction of the NLRB).

5. David Wolcott Kendall Memorial School v. NLRB, 866 F.2d 157 (6th Cir. 1989) 130 LRRM 2334
(Court enforces order of NLRB requiring college to bargain with faculty as they are not excluded as managers).

6. NLRB v. Florida Memorial College, 820 F.2d 1182 (11th Cir., 1987)
(Boards enforcement order granted. Faculty not managerial).

7. NLRB v. Lewis University, 765 F.2d 616 (7th Circuit, 1985) (Court denies enforcement. Finds faculty to be managers).

8. Appeal of Univ. Sys. Bd (N. H. Pub. Emp. Lab. Rels. Bd.), 795 A.2d 840 (2002) (Adjunct faculty at state college were not "temporary employees" and could collectively bargain).

B. Teaching and Research Assistants

1. Leland Stanford Junior University, 214 NLRB No. 82, 87 LRRM 1519 (1974).

   a. University research assistants were not employees for purposes of the NLRA. Their research, said the NLRB, was required for their graduate degrees, regardless of whether they were paid for their efforts.

2. New York University, 332 NLRB No. 111, 165 LRRM 1241 (Oct. 2000).

   a. Graduate students have a protected right to organize and bargain:

   > [W]e find there is no basis to deny collective bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students.... [U]nless a category of workers is among the few groups specifically exempted from the [National Labor Relations] Act's coverage, the group plainly comes within the statutory definition of "employee."

3. N.Y. v. N.Y. State Pub. Employment Rels. Bd., 586 N.Y. F.2d 662 (3d Dept. 1992) (Graduate students are "public employees" under state law).

4. Yale University, 330 NLRB No. 28, 162 LRRM 1393 (1999) (Withholding grades as a means of forcing the University to bargain not protected activity under NLRA).

C. Housestaff/Residents/Interns

1. Boston Medical Ctr. Corp, 330 NLRB No. 30, 162 LRRM 1329 (Nov. 1999) (NLRB overturns prior precedent and grants a unit certification to housestaff unit at Boston University Medical Center Hospital).

2. Comm. of Interns and Residents v. Pub. Health Trust, RC-95-060, 22 Fl. Pub. Employees Rep. P. 27230 (Sept. 1996) App. den. 688 So. 2d 928

(1997) (Housestaff at large public hospital have right to union representation).

D. AAUP Statement on Collective Bargaining:

The basic purposes of the American Association of University Professors are to protect academic freedom, to establish and strengthen institutions of faculty governance, to provide fair procedures for resolving grievances, to promote the economic well-being of faculty and other academic professionals, and to advance the interests of higher education. Collective bargaining is an effective instrument for achieving these objectives.

The presence of institutions of faculty governance does not preclude the need for or usefulness of collective bargaining. On the contrary, collective bargaining can be used to increase the effectiveness of those institutions by extending their areas of competence, defining their authority, and strengthening their voice in areas of shared authority and responsibility. The Association therefore affirms that faculties at both public and private institutions are entitled, as professionals, to choose by an election or comparable informal means to engage in collective bargaining in order to ensure effective faculty governance. Trustees and administrators are of course free publicly to question the desirability of collective bargaining, but they should not resort to litigation or other means having the purpose or effect of restraining or coercing the faculty in its choice of collective bargaining. Where a faculty chooses collective bargaining, the trustees and administration have a corresponding obligation to bargain in good faith with the faculty-selected representative and should not resort to litigation or any other means intended to avoid this obligation.

As a national organization which has historically played a major role in formulating and implementing the principles that govern relationships in academic life, the Association promotes collective bargaining to reinforce the best features of higher education. The principles of academic freedom and tenure, fair procedures, faculty participation in governance, and the primary responsibility of the faculty for determining academic policy will thereby be secured. Moreover, collective bargaining gives the faculty an effective voice in decisions which vitally affect its members' professional well-being, such as the allocation of financial resources and determination of faculty salaries and benefits. For these reasons, the Association supports efforts of local chapters to pursue collective bargaining. (Emphasis added).

E. AAUP Policy for Collective Bargaining Chapters:

1. Protect and promote the professional and economic interests of the faculty as a whole in accordance with the established principles of the Association.

2. Maintain and enhance within the institution structures of representative governance which provide full participation by the faculty in accordance with the established principles of the Association.

3. Obtain explicit guarantees of academic freedom and tenure in accordance with the principles and stated policies of the Association; and

4. Create orderly and clearly defined procedures for prompt consideration of problems and grievances of members of the bargaining unit, to which procedures any affected individual or group shall have access.

II. **Systematic Preparation for collective bargaining.**

A. Review of previous negotiations

1. Review issues from prior negotiations.

2. Review notes/minutes from prior negotiations.

3. Mark and index subject areas anticipated in upcoming negotiations.

4. Evaluate past successes/failures-tactics, timing, concessions, gains, barriers to speedy resolution.

5. Identify dominant personalities in recent negotiations – will their presence or absence be a factor in upcoming negotiations?

B. Review of experience during term of current contract

1. Review present contract to identify any provisions that require modification (e.g., flexibility in workday or workweek).

2. Review contract for any illegal provisions (consider laws prohibiting discrimination, federal/state legislation, recent court decisions) and propose changes, where necessary.

3. Solicit input from supervisors regarding needed changes in labor agreement.

4. Analyze grievance/arbitration cases during term of contract – consider subject matter of grievances, arbitration awards, etc.

5. Consider personnel problems during term of contract and develop proposals and/or strategy to deal with such problems.

6. Identify permissive subjects of bargaining.

C. Data collection (Internal)

1. Prepare wage chronology showing base, average & maximum wage rates over the last 10 years.

2. Prepare benefit chronology showing most significant benefit changes in the last 10 years.

3. Prepare summary of key economic factors.

4. Develop contract costing spreadsheet; calculate base year wage and fringe benefit costs.

5. Develop spreadsheet/chart showing distribution of employees.

6. Prepare age/service of matrix of unit.

7. Collect and review copies of any newly adopted policies, rules, etc. for discussion with Union or incorporation in upcoming contract.

D. Data collection (External)

1. Accumulate data on key economic indicators (e.g., rate of inflation, CPI, UC rates, etc.).

2. Review comparable wage/benefit data.

3. Review settlement terms of comparables.

4. Obtain both public and private sector data.

E. Development of negotiation strategy

1. Establish overall objectives for negotiations.

2. Establish approximate range of desired economic settlement.

3. Determine what, if any, changes in non-economic terms/contract language need to be made (e.g., adverse arbitration awards, costly work practices/schedules, misapplied provisions, grievance "hot spots," unproductive or wasteful contract requirements.)

4. Prepare drafts of proposals.

5. Assemble background data to support proposals.

6. Develop opening statement.

7. Identify critical dates.

F. Preparations regarding union proposals

1. Anticipate Union proposals – investigate, research and obtain information on those which are new or significant.

2. When Union proposal is received, analyze each demand; what does it mean, do we need more information, what are the immediate effects, what are long-term effects, how strongly does Union feel about proposal, how strongly does the membership feel about proposal; what prompted this request, is this a real solution to a problem, what are alternatives?

3. Estimate cost of each economic proposal made by the Union.

4. Prepare position on each proposal; initial, intermediate, final.

5. Prepare statements, arguments, alternative solutions, counterproposals.

6. Draft contract language, where necessary.

G. Communications

1. Develop plan for communicating necessary information to/from supervisors.

2. Develop plan for communicating with Board – method, frequency, amount of detail, need for clearances, etc.

3. Identify person who will communicate with news media representatives and establish guidelines for limitation on information to be disseminated and communications objectives.

4. Communicate regularly with your counterparts in similar institutions.

H. Bargaining representatives and arrangements

1. Select management negotiating team.

2. Establish limits of authority/prioritize proposals.

3. Establish initial meeting date(s); coordinate with Union.

4. Prepare and send contractual reopening notices to the Union and required notices to WERC and official newspaper.

5. Determine location of negotiations meetings – room size, caucus rooms, availability for duration of negotiations; coordinate with Union.

6. Timing of negotiations sessions; coordinate with Union.

7. Make arrangements for support services (secretarial services).

8. Reconfirm authority as necessary.

I. Miscellaneous

1. Develop and monitor job action plan.

2. Develop ground rules.

3. Post-bargaining follow-up/training/in-service.

III. <u>Key issues in collective bargaining.</u>

A. Academic Freedom

B. Governance

C. Salaries

D. Intellectual Property

E. Health Insurance

F. Voluntary Early Retirement

G. Workload/Professional Responsibilities

H. Distance Education

IV. <u>Health Insurance – A negotiation strategy</u>.

A. Gather comparable data.

B. Do not add new benefits.

C. Educate your employees as to the increased cost of insurance premium/benefits.

D. Focus on the total package.

E. Demand/discuss insurance concessions:

1. Eliminate traditional indemnity plans

   a. Explore PPO's, PPN's, HMO's
   b. Obtain/retain the right to change carriers and/or self-fund
   c. Standards: "substantially equivalent" vs. "same as" or "equal to"
   d. Modify plan benefits

2. Limit/reduce employer contributions to premiums

   a. Flat dollar cap
   b. Percentage cap
   c. Require cost increases to be shared
   d. Implement Section 125 Plan

3. Implement/increase employee co-pays

   a. Increase deductibles
   b. Increase co-insurance
   c. Increase prescription drug co-pays
   d. Increase doctor/medical visit co-pays

4. Limit benefits for part-time employees

   a. Pro-ration of premiums
   b. Floor for eligibility

5. Limit benefits for retired employees

   a. Increase minimum age for early retirement
   b. Increase years of service required
   c. Limit number of years that health insurance will be provided
   d. Implement dollar cap rather than tying payments to premium rates
   e. Place caps on leave payout/conversion policies.

6 Obtain/retain non-duplication language

V. **Part-time/Adjunct Faculty.**

A. There has been a huge growth in the use of part-time/adjunct faculty.

1. The Vanishing Professor (1998, AFT)
2. Marching Toward Equity (2001, AFT)

B. Collective bargaining with part-time faculty is emotionally charged and extremely complex due to the competing interests both in and outside the bargaining unit.

C. A part-time faculty bargaining unit is made up of teachers who have a wide variety of reasons for teaching;

1. "Lone soldier"
2. "Patchwork quilt"
3. "Foot-in-the-door"
4. "Giving back"

D. Standards of Good Practice in the Employment of Part-time Adjunct Faculty (2002, AFT)

1. Compensation Standards (AFT)

a. Part-time/adjunct faculty should be paid a salary proportionate to that paid full-time tenured faculty of the same qualifications for doing the same work.

b. Part-time/adjunct faculty should receive prorated sick leave and pay for holidays and breaks.

c. Part-time/adjunct faculty should receive proportionate healthcare and pension benefits.

d. Part-time/adjunct faculty should be paid for holding office hours for student conferences.

e. In the absence of full pro rata pay, part-time/adjunct faculty who participate in institutional committee work should be compensated for doing so.

f. Part-time/adjunct faculty should have employment insurance available to them when they are not on the college payroll.

2. Terms of Employment (AFT)

   a. Part-time/adjunct faculty members should be hired initially with the same care and subjected to the same interview process as any other applicant to the department.

   b. A probationary period of time should be set for the evaluation of part-time/adjunct faculty members, after which they will achieve a form of job security.

   c. Upon successfully completing a probationary period, part-time/adjunct faculty should achieve a form of seniority.

   d. Once seniority is achieved, part-time/adjunct faculty should be subject to non-reappointment in only two circumstances: if the courses taught are not being offered, or for cause, utilizing all due process protections.

   e. Part-time/adjunct faculty should be permitted to order their own texts and design their own courses unless these are departmental decisions, in which case part-time/adjunct faculty should be invited to participate in the deliberations.

   f. Qualified part-time/adjunct faculty who have successfully completed a probationary period should be given preference in consideration for full-time positions in accordance with the requirements of the position, the needs of the department and the part-time/adjunct faculty member's seniority.

3. Standards of Professional Responsibility and Support (AFT)

   a. Upon initial appointment, part-time/adjunct faculty members should be oriented to the institution and to the department, to the curriculum and support services, to the institution's governance and structure, and to the department's expectations regarding the successful performance of their duties.

   b. To ensure adequate preparation time, class assignments should be made, whenever possible, using the same calendar and time line accorded full-time faculty.

   c. Part-time/adjunct faculty should be provided suitable office space and should have paid office hours to meet with their students.

d. Part-time/adjunct faculty who have achieved seniority and the job security that goes with it should be invited to participate in departmental meetings and other committees with voting privileges and should be compensated for doing so.

e. Part-time/adjunct faculty should have access to secretarial and technological support services necessary to the fulfillment of their responsibilities as well as to adequate supplies, to the library and to other campus privileges.

f. Part-time/adjunct faculty should have opportunities and financial support to participate in conferences and workshops for their professional development, to apply for grants and to participate in the institution's tuition support program.

VI. **Conclusion.**

A. Organizational activity is on the upswing.

B. Collective bargaining is here to stay.

C. New issues require new approaches and thinking.

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